The ABA has long recognized the importance of promoting and adhering to mechanisms for the peaceful resolution of international disputes. In 1947, the ABA House of Delegates adopted a policy recommending that the United States "in order to further the administration of international justice . . . refer[] all international questions or disputes susceptible of being decided on the basis of law, which cannot be settled by direct negotiations, to the International Court of Justice or to arbitral tribunals." 72 REPORTS OF THE AMERICAN BAR ASSOCIATION 102-03 (1947). In the same year, the ABA House of Delegates adopted a resolution expressing the ABA's "great satisfaction" that the United States had accepted the jurisdiction of the International Court of Justice "as binding upon it." *Id.* at 377.

The ABA House of Delegates reaffirmed its support for deferring to the International Court of Justice when it adopted a policy in 1994 recommending that the United States Government present a declaration recognizing that the International Court of Justice has "compulsory" jurisdiction in all legal disputes concerning "the interpretation of a treaty," "any question of international law," or "the nature or extent of the reparation to be made for the breach of an international obligation."

In 1998, the ABA House of Delegates adopted a resolution specifically recognizing the importance of complying with the Vienna Convention on Consular Relations and urging "federal, state, territorial and local law enforcement authorities to adopt a warning of rights similar to the '*Miranda*' standard, advising foreign nationals of their right to consular assistance pursuant to Article 36 of the Vienna Convention."

Consistent with both its position with respect to the Vienna Convention and the United States' international obligations, as well as its concern with promoting meaningful access to the justice system, the ABA has adopted guidelines for attorneys representing foreign nationals. *See* Guideline 10.6 – Additional Obligations of Counsel Representing a Foreign National, adopted by the House of Delegates in February 2003. The

guidelines instruct that at every stage of a case, counsel "should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." Unless predecessor counsel has already done so, an attorney representing a foreign national is instructed to "immediately advise the client of his or her right to communicate with the relevant consular office," to "obtain the consent of the client to contact the consular office," and then to immediately contact the consular office to inform it of the client's detention or arrest.

Although Petitioner Bustillo did not receive a capital sentence, the ABA recognizes that the issues decided in this case will have wide ranging consequences for foreign nationals who face or have received death sentences.[3] The ABA has expressed misgivings about the use of state procedural bars to dispose of federal habeas claims in capital cases. In 1990, the ABA House of Delegates adopted a resolution that in death penalty cases:

> [f]ederal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to

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3. While the ABA takes no position on the death penalty as a general matter, it has repeatedly voiced its acute interest in the fair and competent representation of defendants in capital cases. In 1989, the ABA House of Delegates adopted Resolution 122, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Death Penalty Guidelines"), which was designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel. *See also* ABA Standards for Criminal Justice: Providing Defense Service Standards, Standard 5-1.2 cmt. at 12 (3d ed. 1992) ("These guidelines are incorporated by reference into the [ABA Providing Defense Services Standards]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function ("ABA Prosecution Function and Defense Function Standards"), Standard 4-1.2(c) (3d ed. 1993) ("Defense counsel should comply with the [ABA Death Penalty Guidelines].").

> raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

The ABA appears as *amicus curiae*, as it also did in *Medellin v. Dretke* when this Court last considered the obligations of the United States under the Vienna Convention, because the questions presented in this case have serious implications for the stability of the rule of law throughout the world and for the effective representation of foreign nationals prosecuted in American courts and Americans prosecuted in foreign courts.

SUMMARY OF ARGUMENT

In 1963, at the height of the Cold War, the United States signed the Vienna Convention on Consular Relations. Apr. 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention"). Article 36 of the Convention guarantees to all United States citizens abroad and to foreign nationals in this country that if they are arrested outside their home country: (1) law enforcement officials will tell them without delay that they may have their nation's consul informed of their arrest, and (2) if they consent to notification, the law enforcement entity will promptly advise the consul of their arrest. The United States played a leading role in negotiating the wording of Article 36. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61. To ensure the faithful and consistent application of these important protections, the United States also proposed and advocated for the dispute settlement provision that became the companion Optional Protocol. *Id.* at 72-73. The Optional Protocol provides for compulsory jurisdiction by the International Court of Justice ("ICJ") over all signatory nations to resolve any disputes concerning the interpretation of the Convention's provisions. *See* Optional Protocol, 21 U.S.T. 325, art. I.

Once the Vienna Convention and Optional Protocol were ratified by the Senate, they became binding on the United States as a whole and, under the Supremacy Clause, preemptive of any conflicting state laws. Nevertheless, when Virginia law enforcement officers arrested Mr. Bustillo, a Honduran national, they did not inform him of his right to consular notification. Pet. for Cert. at 3. Mr. Bustillo was therefore unable to take advantage of the valuable assistance that consular officers can provide to defendants charged with serious crimes. For example, consular officers will often visit the foreign national soon after he is detained, provide a list of qualified local attorneys, and relay requests for material aid to family members in the home country. *See id.* (noting a declaration submitted by the Honduran consulate detailing the assistance it would have rendered); *see also* United States Department of State, Bureau of Consular Affairs, *Assistance to U.S. Citizens Arrested Abroad*, *available at* http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html. In addition, consular officers may help navigate local bureaucracies, explain the local legal system and its requirements, and provide support during trial proceedings by attending court sessions. *See Assistance to U.S. Citizens Arrested Abroad.*

Virginia's failure to alert Mr. Bustillo of his right to consular assistance or to notify the Honduran consulate directly of Mr. Bustillo's arrest had particularly dire consequences for Mr. Bustillo's case. Mr. Bustillo was charged with the first-degree murder of James Merry. Mr. Bustillo's defense was that the murder was perpetrated by a man nicknamed "Sirena"—now known to be Julio Osorto. *See* Pet. for Cert. at 2. Sirena, who like Mr. Bustillo is a Honduran national, fled the United States for Honduras the day after Mr. Merry died. *Id.* Mr. Bustillo's counsel could obtain only limited information about Sirena and his whereabouts by the time of trial, which allowed the prosecution to attack the credibility of Mr. Bustillo's defense. *Id.*

If Virginia had carried out the consular notification requirements of Article 36, the Honduran Consulate could have provided the critical information about Sirena that Mr. Bustillo's defense counsel was unable to obtain. *See id.* at 3 (describing the information the Honduran Consulate could have provided had it been notified of Mr. Bustillo's detention). Without access to this information Mr. Bustillo could provide only a silhouette of Sirena to the jury, which allowed the prosecution to impeach Mr. Bustillo's account of the crime in a manner that would not have been possible had Virginia law enforcement officials carried out their federal obligation to inform the Honduran Consulate of Mr. Bustillo's detention.

The United States admits that Mr. Bustillo's Article 36 rights were violated and it has apologized to Honduras for the violation. *Id.* Nevertheless, Virginia's courts provided no remedy for the violation and declined even to consider the substantive issue of whether Mr. Bustillo's trial was actually prejudiced by the federal violation. Instead, the courts disposed of Mr. Bustillo's state habeas petition on the grounds that Mr. Bustillo had procedurally defaulted his Vienna Convention claim by failing to raise it in the first instance. *Id.* This approach defies the ICJ's express interpretation of Article 36, which forbids procedural default rules from being employed to bar substantive consideration and enforcement of the Vienna Convention. That interpretation is the definitive interpretation of the treaty under the Optional Protocol. On two occasions the ICJ has held that invoking procedural default doctrines to dispose of Article 36 claims is itself a violation of the Vienna Convention. *See Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (March 31) ("*Avena*") ¶¶ 112-13; *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) ("*LaGrand*"). In *Avena*, the ICJ also held that, despite typical procedural default rules, United States courts must provide review and reconsideration of the

convictions and sentences tainted by the violations it had found.[4]

Although the Executive Branch has since unilaterally announced that the United States was withdrawing from the Optional Protocol, the ICJ entered judgment in the *Avena* and *LaGrand* decisions while the United States was still a party to the Optional Protocol. The United States' willing submission to the jurisdiction of the ICJ to interpret the Vienna Convention means that the principles identified in *Avena* and *LaGrand* are entitled to deference in defining the mutual obligations of the United States as a continuing party to the Vienna Convention. While a withdrawal from the Optional Protocol might allow the United States to implement its own interpretation of the Vienna Convention when future issues arise, it would severely undermine our domestic and international commitment to the rule of law and endanger Americans arrested abroad to decline to submit to an ICJ interpretation after pledging to do so.

Moreover, adhering to the ICJ's interpretation of Article 36 in state habeas cases like Mr. Bustillo's would avoid undue delay and expense in assuring enforcement of rights under

4. The *Avena* Judgment built on and strengthened the ICJ's earlier judgment in the *LaGrand Case*, a case brought by Germany against the United States also alleging violations of the Vienna Convention. (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) ("*LaGrand*"). Unlike in *Avena*, by the time the ICJ ruled in *LaGrand*, both of the German nationals in question had been executed. The ICJ held in *LaGrand* that: (1) Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; (2) applying procedural default rules to prevent detained individuals from challenging their convictions and sentences on the ground that their rights under Article 36 of the Vienna Convention had been violated itself violated the Vienna Convention; and (3) if the United States failed to comply with Article 36 in future cases involving German nationals subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand*, ¶¶ 77, 90-91, 125.

the Vienna Convention. This approach would also spare the federal courts from having to wade into murky questions of reconciling the ICJ's admonishment not to utilize procedural default doctrines with the deferential standards that federal courts traditionally apply to state procedural rules in habeas proceedings. *See Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (per curiam opinion accompanying order dismissing writ as improvidently granted). Unlike the limits on federal habeas jurisdiction imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which as an act of Congress is "on a full parity" with a treaty, *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion), state procedural default rules are not the "supreme Law of the Land." U.S. Const. art. VI. State courts have a constitutional obligation to enforce federal law rather than state law to the extent the two conflict—and state procedural rules are no exception. Given the concerns expressed by this Court in *Medellin* about squaring the decisions in *LaGrand* and *Avena* with the demands of AEDPA, limiting the use of procedural bars in state collateral proceedings may be the only viable means of ensuring that the consular notification provisions of Article 36 will be given their full effect.

This Court has acknowledged that claims that are analogous to the failure to notify a consulate, such as ineffective assistance of counsel, can so infect direct proceedings that they are better suited to collateral review. *See Massaro v. United States*, 538 U.S. 500, 504 (2003). Thus, implementing the *LaGrand* and *Avena* decisions by precluding the use of judicially created procedural bars in state collateral proceedings will channel consular notification claims to the most appropriate forum for resolution.

Enforcing federal obligations under the Vienna Convention in state post-conviction proceedings will not unduly encroach on state courts. As an initial matter, adopting a rule forbidding the use of procedural bars for consular notification claims will lead to increased compliance with the Vienna Convention. This compliance by local law enforcement will keep Article 36 claims

out of court in the first instance. It is also likely that criminal defendants will have to show prejudice from the consular notification defect to obtain some form of collateral relief. Because not all defendants will be able to make this showing, the obligations of the United States to its treaty partners may be satisfied with minimal administrative burden in many cases.

ARGUMENT

I. Giving effect to the ICJ's authoritative interpretation of Article 36 in *LaGrand* and *Avena* in the context of state habeas proceedings is necessary to ensure compliance with the guarantee of consular access to which the United States committed by ratifying the Vienna Convention.

By ratifying the Vienna Convention, the United States committed to the consular notification and access provisions of Article 36. The United States Department of State, realizing the importance of ensuring reciprocal compliance by other nations, recently confirmed the Executive Branch's commitment to securing the rights created by Article 36. *See* United States Department of State, *Announcement: All Consular Notification Requirements Remain in Effect*, *available at* http://travel.state.gov/news/news_2155.html ("The U.S. is fully committed to compliance with our international legal obligations under the [Vienna Convention], and actively works to improve compliance nationally."). Nevertheless, effective notification for detained foreign nationals of their Article 36 rights remains stubbornly elusive.[5] For several reasons, this disparity between our

5. Studies of consular notification practices have found that in capital cases, law enforcement officials complied with the requirement of Article 36 in less than five percent of cases. *See* Mark Warren, Human Rights Research, *Foreign Nationals and the Death Penalty in the United States* (May 28, 2005), http://www.deathpenaltyinfo.org/article.php?did=198&scid=31 (finding that notification occurred in 7 out of 160 capital cases). In non-capital cases, performance has been even more dismal—notification took place in four cases out of an estimated 53,000 cases in New York City during 1997. *Id.*

international treaty obligations and the ineffectiveness of law enforcement officials in carrying out those legal commitments demands that this Court implement the ICJ's decisions in *Avena* and *LaGrand* by prohibiting state courts from applying procedural default rules to block Vienna Convention claims.

First, the ICJ's decisions provide remedies for the failure to inform detained foreign nationals of their consular rights. Without these remedies, local law enforcement officials can ignore the international legal obligations of the United States without consequence. *But see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). The requirement of notifying foreign nationals of their consular notification rights places a bureaucratic burden, albeit a slight one, on local law enforcement officials. These officials will continue to avoid this burden unless there are ramifications for failing to provide appropriate notice.

Second, as this Court noted in *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (per curiam opinion accompanying order dismissing writ as improvidently granted), there are some potential problems with reconciling the ruling of the ICJ in *Avena* with the limitations AEDPA places on federal habeas proceedings. For example, the Court discussed in *Medellin* the possibility that a violation of consular access provisions is a "nonconstitutional lapse[] we have held not cognizable in a [federal] postconviction proceeding." *Id.* at 2090 (quoting *Reed v. Farley*, 512 U.S. 339 (1994)). The Court also noted that the non-constitutional nature of the treaty violation might impede the grant of a certificate of appealability, as required by 28 U.S.C. § 2253(c). *Id.* at 2091. The Court also suggested

that a federal habeas petitioner might encounter obstacles to showing that a violation of Article 36 is the type of "new rule" that can overcome the substantial showing articulated in *Teague v. Lane*, 489 U.S. 288 (1989).[6] *Medellin*, 125 S. Ct. at 2091. While there are reasons to believe that a criminal defendant could overcome these obstacles, it would demand substantial effort and would present many difficult legal questions to attempt to fit Article 36 claims into federal habeas proceedings in the first instance. *Id.* (explaining potential difficulties with reconciling the *Avena* Judgment with the demands of federal law).

The structural source of these difficulties is the "full parity" between treaties and federal statutes. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion). These types of laws have the same status under Art. VI of the Constitution—they are both the "supreme Law of the Land." Reconciling countervailing commands from coequal sources of law can give rise to vexing problems of interpretation. *See, e.g., United States v. Dion*, 476 U.S. 734, 738-40 (1986) (discussing the wide variation in standards used to determine whether a statute conflicts with a treaty).

This problem vanishes when a treaty and state law contain conflicting commands—the treaty trumps state law. *See Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law.").

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6. There are two reasons to believe that *Teague* does not present any barriers to petitioner's case, which comes to this Court on direct review of state habeas proceedings. First, *Teague* is a rule of *federal* habeas review and this Court has never applied *Teague* to state habeas review. *See* Reply Br. of Pet'r at 3-6 (citing cases). Second, the respondent raised the *Teague* argument for the first time in its petition for certiorari, so it is accordingly waived. *Id.* at 6-7.

The Constitution imposes a clear, independent obligation on states to enforce federal law in their own courts absent an express exemption from Congress. *See Tafflin v. Levitt*, 493 U.S. 455, 469-70 (1990) (Scalia, J., concurring) ("[T]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State.") (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)). Accordingly, states *must* recognize and implement treaties even if they are inconsistent with the laws of a state. *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement.").

Given the potential difficulties with using federal habeas proceedings to give effect to Vienna Convention rights and the cleaner option of delegating enforcement to state courts, this Court should ensure the availability of the remedies on state habeas for detained foreign nationals. Otherwise, the United States will continue to be out of compliance with the Vienna Convention. This would attenuate the reciprocal guarantee of consular notification rights and would endanger Americans detained abroad. As this Court has observed: "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the . . . rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). The framers of the Vienna Convention designed the treaty to enable countries to help their own nationals when those nationals are abroad, in part by agreeing to allow other countries to take similar steps where their citizens are concerned. If the United States fails to meet its mutual

obligations under the Vienna Convention as they have been interpreted by the ICJ, it risks losing its ability to insist that other countries abide by their obligations to respect the consular rights of American citizens on their soil.

The United States routinely demands that it receive notice when its citizens are detained by foreign authorities. The State Department in fact requires consular officials to lodge a protest if detaining authorities do not notify the consul within 72 hours. *See* 7 Foreign Affairs Manual § 426.2-1 (2004), *available at* http://foia.state.gov/masterdocs/07fam/07m0420.pdf. The United States cannot expect other countries to respect its citizens' consular rights, however, if the United States does not honor the reciprocal rights of those countries and their citizens in the face of state procedural impediments.

II. The ICJ's authoritative interpretations of Article 36 in *LaGrand* and *Avena* should endure beyond the post-judgment decision to withdraw from the Optional Protocol.

The Optional Protocol to the Vienna Convention originated as a proposal by the United States to ensure faithful and consistent application of the Convention's protections. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 72-73. The Optional Protocol gives the ICJ compulsory jurisdiction over all signatory nations to resolve disputes over the interpretation of the Vienna Convention. The United States Senate ratified the Vienna Convention and the Optional Protocol in 1969.

The United States has relied upon the compulsory jurisdiction of the ICJ to protect its own citizens overseas. In fact, the United States was the first country to invoke the Optional Protocol, which it used to bring an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in 1979. *United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1979

I.C.J. 7 (Dec. 15), 1980 I.C.J. 3 (May 24). In bringing that application, the United States relied on the Optional Protocol's establishment of the ICJ's compulsory jurisdiction over disputes arising out of the interpretation or application of the Vienna Convention. When the ICJ ruled in favor of the United States provisionally in 1979 and then finally in 1980, 1979 I.C.J. 7, 1980 I.C.J. 3, the United States insisted that Iran was bound to comply with the court's judgment.

On March 7, 2005, President Bush issued a letter through the Secretary of State to the UN Secretary General purporting to withdraw from the Optional Protocol.[7] *See* Letter from Condoleeza Rice, U.S. Sec'y of State, to Kofi Annan, United Nations Sec'y General. Even assuming that letter effected a withdrawal, the withdrawal does not obligate this Court to refrain from implementing the interpretations of Article 36 issued by the ICJ prior to the withdrawal.

A. The decisions of the ICJ issued prior to the withdrawal from the Optional Protocol continue to define the United States' obligations under the Vienna Convention.

When the United States signed the Optional Protocol, it promised to submit disputes over the meaning of Vienna Convention obligations to the ICJ and to treat the ICJ's rulings as binding. The United States then further submitted to the ICJ's jurisdiction by actively participating in the proceedings before the ICJ in *Avena*. *See* Pet. for Cert. at 6, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (describing the

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7. It is an open question whether the President can withdraw from a treaty without the consent of the Senate. *See Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (noting that there is no Constitutional provision that commits the authority to terminate treaties to the President) (Powell, J., concurring). Given that the Senate ratified the Optional Protocol, it is not clear whether Secretary Rice's letter has any legal effect. This question, however, is beyond the scope of this brief.

18-person United States team at the hearing before the ICJ in *Avena*, which was led by the Honorable William Howard Taft IV, Legal Advisor to the State Department, and which included lawyers from the Departments of State and Justice); *see also* Br. for Pet'r at 9, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (noting that the United States filed a 219-page Counter-Memorial and 2500-page Annex of written testimony and documentary evidence with the ICJ in *Avena*).[8] The United States must therefore be bound by the ICJ's interpretations of the Vienna Convention in *Avena* for as long as the United States continues to be a signatory to and so to be bound by the Vienna Convention.

Withdrawal by the United States from the ICJ's jurisdiction over future disputes does not affect its obligation to implement ICJ rulings, such as *LaGrand* and *Avena*, that were issued when the United States was subject to the ICJ's jurisdiction.[9] In *Avena*, the ICJ understood that it was issuing

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8. The substantial effort put forth to argue the merits in *LaGrand* and *Avena* differs starkly from the United States' actions in *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), in which the United States did not recognize the subject matter jurisdiction of the ICJ. In that case, the United States took measures to avoid ultimately being deemed subject to any ICJ judgment, including refusing to participate at all in the proceedings before the ICJ. If the United States wished to revoke the ICJ's authority to provide a binding interpretation of the Vienna Convention, then it could have attempted to avail itself of similar measures.

9. The United States has attempted to argue that the doctrine of nonmutual collateral estoppel will not apply to future Article 36 litigation between parties that were not part of the *Avena* proceedings. *See* Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 47 (citing *United States v. Mendoza*, 464 U.S. 154 (1984)). However, the primary reason for the narrow ruling in *Mendoza* limiting the *domestic* use of nonmutual collateral estoppel against the government was the barrier it would create to the development

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a binding interpretation of the Vienna Convention that would provide prospective guidance for the United States. As the ICJ explained:

> [T]he Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention . . . . In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

Avena, ¶ 151. The United States, when it accepted the jurisdiction of the ICJ, committed to enforce "the nature or extent of the reparation to be made for the breach of an international obligation" specified by the ICJ. *Declaration by the President of the United States of America August 14, 1946 respecting recognition by the United States of America of the compulsory jurisdiction of the International Court of Justice*, 61 Stat. 128 (1946). The remedy issued in this case specifically includes a requirement that United States courts adapt their procedures to ensure that claims arising under the Vienna Convention be heard on the merits. Thus, regardless of whether the ICJ's jurisdiction over the United States' interpretation of the Vienna Convention may be limited in the future, that does not alter the United States'

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of circuit splits for the Supreme Court to resolve. *Mendoza*, 464 U.S. at 160-61. That concern is not present here because the ICJ is a single tribunal—this feature has allowed the United States to carefully develop and argue its views in discrete cases before the ICJ. It would be tremendously wasteful not to accord comity or some estoppel value to ICJ decisions because, without these checks on litigation, the ICJ would have to issue an unending stream of nearly identical judgments on the interpretation of Article 36.

present and continuing obligation to implement the prospective reparation the ICJ specified in all cases where jurisdiction was proper.

Examples from American and international contexts confirm the principle that binding legal interpretations endure beyond a subsequent elimination of jurisdiction. In domestic courts, this question arises when a federal circuit court is divided so that certain states are no longer within the jurisdiction of the appellate court that previously governed them. *See, e.g.*, Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (creating the new Eleventh Circuit from States that were formerly part of the Fifth Circuit). When this occurs, the new circuit remains bound by precedents established by the former circuit before the new circuit was formed. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc). The rationale for this rule is straightforward—at the time the former circuit ruled, it had jurisdiction over the states in the new circuit. Other common law countries have applied similar reasoning when confronted with analogous questions. For example, when the Free Republic of Ireland ratified its constitution in 1922, the new legal apparatus had jurisdiction to create binding Irish law. However, Irish courts continued to be bound by pre-1922 decisions of the House of Lords because, at the time of those decisions, the House of Lords had jurisdiction over Ireland. *See Corway v. Independent Newspapers (Ireland) Limited*, [1999] 4 I.R. 484, ¶¶ 26-29 (explaining the operation of pre-1922 law in Ireland).

These principles apply to the withdrawal from the Optional Protocol—at the time the ICJ ruled on the interpretation of Article 36, the United States had submitted to the compulsory jurisdiction. Accordingly, the ICJ's ruling that the United States must accord "review and reconsideration" to those foreign nationals who were denied a hearing on their Article 36 claims continues to be a binding

interpretation of the United States' obligations under the Vienna Convention.

If the United States could eliminate any obligation to abide by the ICJ's interpretation of the Vienna Convention in *Avena* by withdrawing from the Optional Protocol, merely because the United States disagreed with the ICJ's ruling, treaty promises such as that the United States made when it signed the Optional Protocol would be meaningless. Allowing the United States to do so would severely undermine the rule of law internationally.

B. At a minimum, *Avena* Controls this case because the withdrawal from the Optional Protocol does not have retroactive effect.

Determining the precise operation of the ICJ rulings in the future, however, is not necessary to resolve the claims of criminal defendants like Mr. Bustillo. Even if the Court wishes to defer resolving the question of whether the ICJ's judgment in *Avena* is prospectively binding, the withdrawal from the Optional Protocol could not affect Mr. Bustillo's sentence because at the time of the failure to notify him of his Article 36 rights, the United States was a party to both the Vienna Convention and the Optional Protocol. It is an elementary legal principle that, if there is jurisdiction over a person or subject at the time of a transgression, a court has jurisdiction to resolve any disputes arising out of that transgression even if there is no longer jurisdiction over the person or subject. *See, e.g.*, Restatement (Second) of Conflicts of Laws § 35(2) (1971), comment d (explaining that if jurisdiction over a foreign corporation existed at the time of a transgression a subsequent withdrawal from the state by a corporation does not affect jurisdiction over the transgression). It follows from this principle that the presence of ICJ jurisdiction at the time of the violation is sufficient to give force to an ICJ judgment that bears on the failure to provide consular notification. *See* Vienna Convention on the

Law of Treaties, Article 70(1)(b) ("Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty . . . does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.");[10] *see also Society for the Propagation of Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. 464, 493 (1823) ("If [a right] be . . . secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right.").

Before any Virginia court denied the petitioner's state habeas petition, on June 27, 2001, the ICJ decided in *LaGrand* that procedural bars to Vienna Convention claims were not appropriate. *See LaGrand*, ¶ 125. The ICJ repeated this holding in *Avena* on March 31, 2004, before the Fairfax County Circuit Court or the Supreme Court of Virginia had entered final orders on the petitioner's state habeas petition. *See Avena*, ¶ 122. Thus, at the time the decision below was entered, there were two binding ICJ judgments that were in direct conflict with the Supreme Court of Virginia's decision.

The Virginia Supreme Court violated federal law and treaty obligations in its unpublished decision, which failed to even mention the authoritative interpretation of the Vienna Convention. To allow withdrawal from the Optional Protocol to retroactively excuse such disregard of the "supreme Law of Land," would undermine the stable and consistent application of the decisions of international tribunals. Given the striking similarity of petitioner's claim to the claims at issue in *Avena* and *LaGrand*, there is no way to distinguish petitioner's claim in a manner that would justify Virginia's

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10. The United States has signed, but not ratified, the Vienna Convention on the Law of Treaties. Nevertheless, federal courts have used this treaty as guide when there is no other legal authority to guide interpretation. *See, e.g., Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 n.5 (2d Cir. 2004); *United States v. Yousef*, 327 F.3d 56, 95 (2d Cir. 2003) (compiling examples).

use of a procedural bar. To excuse the Supreme Court of Virginia's refusal to adhere to the ICJ's authoritative interpretation on the basis of a later withdrawal of jurisdiction would erode our domestic and international commitment to the rule of law.

C. This Court has expressed a willingness to defer to the expertise of the ICJ.

This Court's per curiam opinion in *Breard v. Greene*, 523 U.S. 371 (1998), appropriately expressed a readiness to give comity to ICJ interpretations. In *Breard*, the Court rejected the argument that the Vienna Convention trumps the procedural default doctrine, an argument made by Petitioner Breard in a petition for an original writ of habeas corpus on the eve of his execution. *Id.* at 375. The Court expressed the view that, at that time, the procedural default doctrine was not inconsistent with the Vienna Convention. *Id.* The Court explained that it would have "give[n] respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such" if there were such an interpretation. *Id.* But "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* The ICJ has since provided precisely such "a clear and express statement to the contrary." *Id.* at 371. *See Avena*, ¶ 113. This subsequent authoritative interpretation of the Convention by the ICJ eliminates the primary rationale upon which the *Breard* decision was based.

Accordingly, even if the withdrawal from the Optional Protocol effectively eliminates *compulsory* jurisdiction for the ICJ, this Court should extend comity to the ICJ's interpretations of Article 36 in *LaGrand* and *Avena*. The ICJ's sole function is the interpretation of treaties and other agreements between states. *See* Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055

(confining the jurisdiction of the court to matters included in the United Nations Charter or treaties, cases where states consent to jurisdiction to resolve disputes over interpretations of treaties, and other questions of international law). The careful and deliberative approach of the ICJ's fifteen judges, who decide only a handful of cases every year and draw upon their knowledge and experience as persons familiar with application of multilateral treaties in numerous fora, justifies deference to the ICJ's efforts to facilitate the uniform interpretation and implementation of treaties throughout signatory nations. *See* Robert Y. Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 497 (1995); *see also* Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004) ("[t]he whole object of [a] treaty . . . is to establish a single, agreed-upon regime governing the actions of all the signatories. . . ."). Treating *LaGrand* and *Avena* as authoritative interpretations of the Vienna Convention would comport with this Court's previous practice of using ICJ judgments as definitive statements of the meaning of international agreements. *See United States v. Maine*, 475 U.S. 89, 99 (1986); *United States v. Louisiana*, 470 U.S. 93, 110 (1985) (citing *Fisheries* Case (U.K. v. Norway), 1951 I.C.J. 116 (Dec. 18), as an authoritative interpretation in a maritime boundary dispute).

III. State habeas provides an appropriate forum for giving effect to the ICJ's ruling that the use of procedural bars to dispose of consular notification claims violates the Vienna Convention.

Given the potential difficulties with federal habeas proceedings as a forum for "review and reconsideration" of Article 36 claims, state habeas proceedings provide a natural alternative for ensuring that the United States meets its treaty obligations. Indeed, the President has already recognized the unique suitability of state collateral proceedings to

implement the ICJ's interpretation of the Vienna Convention. *See* discussion *infra* pp. 26-27. This Court should, like the Executive Branch, determine that the vital international interests at stake in our implementation of Article 36 far outweigh the minimal burden created by a restriction on the use of procedural bar rules to dispose of consular notification defects. *See* Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 41-43; *see also* discussion *infra* pp. 27-28.

A. The balance of interests underlying procedural default rules weighs against their application when treaty rights are at stake.

State procedural default rules are typically judge-made rules that endeavor to balance the need for administrative efficiency with the substantive rights of criminal defendants. Given the longstanding practices underlying the purpose of the procedural default doctrine, state and federal courts are often reticent to create exceptions on a case by case basis. However, when rights secured by the Vienna Convention bump up against procedural rules, the balance of policy interests is significantly different than it is when just the individual defendant's substantive rights are at stake. When a state arrests or prosecutes a citizen of a country that is a signatory to the Vienna Convention and fails to comply with the Convention's requirements, that failure violates not only the defendant's rights, but also the rights of the defendant's home country. *See, e.g., LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) ("*LaGrand*") ¶ 74 ("[W]hen the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36."); *Avena*, ¶ 102 (describing the United States as precluding Mexico "from exercising its right" under one provision of the Convention). Those rights include the

rights "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention, art. 36 ¶ 1(c).

When a state fails to honor a treaty-partner's Vienna Convention rights, the federal government must deal with the consequences. The resulting tensions in international relations can be substantial. *See, e.g.*, Brian Knowlton, *Execution Pits Mexico Against U.S. – Fox Echoes World On Death Penalty*, INT'L HERALD TRIB., Aug. 16, 2002, at 1 (reporting that Mexican President Vicente Fox canceled a trip to visit President George W. Bush's Texas ranch to protest Texas's execution of a Mexican national who had not been told of his Vienna Convention rights). The inability of other nations to bring prosecutions before the ICJ as a result of the United States' withdrawal from the Optional Protocol will only exacerbate these tensions if domestic courts are unable to implement the remedies specified in the *LaGrand* and *Avena* judgments.

The impact on international relations distinguishes Vienna Convention rights from most other rights that have been subjected to procedural default rules. Generally, if an American defendant violates a state procedural rule in attempting to assert an individual right, only that individual's rights are affected. In such situations, this Court has determined that the need for judicial efficiency generally requires that any claim to that right be considered procedurally defaulted. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). The balance of interests tips much more heavily toward the enforcement of the substantive right, however, when the right at issue belongs not just to the defendant, but also to his home country. Indeed, it would intrude on the federal government's constitutionally protected, exclusive, and paramount right to maintain international relations if individual states could freely enforce procedural default

doctrines in a manner that deprives a sovereign treaty-partner – which was never informed of the arrest and detention of one of its citizens – of commitments made to it by the United States. Indeed, in this case, Virginia would place the entire scope of a treaty-partner's sovereign rights in the hands of an individual attorney, who, through ignorance or mistake alone, could "waive" international obligations to those treaty partners.

The fact that the ICJ has issued the *Avena* Judgment also affects the policy considerations that necessarily bear on the question of whether some Vienna Convention claims should be exempt from the procedural default doctrines. The foreign relations stakes, and thus the national interest in the relationship between the Vienna Convention and the procedural default doctrines, are quite high. They are, in fact, dramatically higher now that the ICJ has issued the *Avena* Judgment, which requires reconsideration of otherwise defaulted Article 36 claims, than they were at the time this Court considered the effect of the Vienna Convention on federal procedural default rules in *Breard*. *See Breard*, 523 U.S. at 375 (noting the lack of any international court ruling at the time). The implications of such a decision for international relations are grave and are entirely different now than they were at the time *Breard* was before the Court.

B. State collateral proceedings are an appropriate forum for resolving the unique problems presented by consular notification defects.

Consular notification claims are ill-suited to direct review. In almost all cases on direct review, procedural rules confine the evidentiary record to information presented at the trial level. This feature of criminal proceedings imposes a barrier for the adequate and effective review of consular notification claims on direct appellate review. Documenting the occurrence and effect of consular notification is an intensive evidentiary task—counsel must: establish that

consular notification did not take place, obtain documentation from consular officials attesting to the assistance they could have provided, and develop evidence to demonstrate the effect of consular assistance. If this evidence is not in the trial record, appellate courts will be hesitant, and perhaps ill-equipped, to address consular notification claims effectively.

This Court has recognized that when claims are not suited to direct review, courts may not use procedural bars to resolve those claims on collateral review. In *Massaro v. United States*, 538 U.S. 500 (2003), this Court refused to allow the use of procedural bars for ineffective assistance claims on collateral review even if the criminal defendant could have brought the claim on direct review. The Court explained that it would be problematic to require criminal defendants to bring ineffective assistance claims on direct review because "evidence introduced at trial, . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary [to determine whether counsel has been ineffective]." *Id.* at 505. In contrast, collateral proceedings provide a criminal with "a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created." *Id.* at 505-06 (quoting *United States v. Griffin*, 699 F.2d 1102, 1109 (11th Cir. 1983)).

Like ineffective assistance of counsel, the failure to provide the right to consular notification can taint criminal trials in ways that are not apparent from the trial record itself. For example, that record will not reflect the evidence that would have been obtained through factual investigation that the consulate has had no opportunity to conduct. As in this case, such evidence could include information about

witnesses or suspects who returned to the defendant's home country, information to which the consulate would have had ready access. The trial record will also likely fail to reflect any failure by the defendant to assist his attorney in his defense that may have resulted from the defendant's lack of understanding of the American justice system, a lack of understanding that the consulate could have helped ameliorate.

C. The President has determined that state collateral proceedings are well-suited for implementing the *Avena* Judgment.

The Executive Branch has itself recognized that state collateral proceedings are the appropriate forum to remedy consular notification defects. Indeed, the President has made the policy judgment that Texas courts should extend comity to the ICJ's decision in *Avena* by prohibiting the use of state procedural default rules to block Vienna Convention claims. *See* Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 41-43 ("To the extent that state procedural default rules would prevent giving effect to the . . . *Avena* decision . . . those rules must give way."). *Id.* at 43. The President highlighted the unique "suitability of judicial review as a means of compliance" with the *Avena* decision. *Id.* at 41. Thus, there is no conflict between the conclusion that the Supremacy Clause compels state courts to lift their procedural bars to accommodate our federal obligations under the Vienna Convention and the President's desired means for implementing *Avena*.

That the President has attempted to limit state courts' implementation of *Avena* to the individual cases directly considered by the ICJ in *Avena* has no significance. While the President has "a degree of independent authority to act" in "foreign affairs," *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003), this authority does not permit the Executive to pick and choose the relevant legal rules based

on the identity of a domestic criminal defendant. *Contrast* Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 48-49 (expressing the desire to retain Executive prerogative over which criminal defendants will benefit from the *Avena* Judgment). The application of law in an individual case is at the heart of the judicial power. To allow the President to exercise this authority (or to allow the Executive to employ the legislative power to determine the jurisdiction of the courts), would violate the first principles of separation of powers. As this Court explained in *United States v. Nixon*:

> [The] judicial Power . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

418 U.S. 683, 704 (1974).

D. Easing restrictions on the use of procedural bars in collateral proceedings would not place a significant burden on state courts.

Providing the circumscribed relief from state procedural bar rules required under the Vienna Convention would not open the floodgates to Article 36 claims on state habeas for at least two reasons. First, the existence of limited relief for foreign nationals detained in violation of the Vienna Convention would, at long last, provide an incentive for law enforcement officials to develop systematic methods to inform detainees of their right to consular notification. The development of a standardized means to convey the required information to detainees would prevent Article 36 violations from occurring in the first instance. A state's effective elimination of Article 36 violations would be an appropriate prophylactic means of avoiding federal limits on its procedural bar rules.

Second, as the ICJ directed in *Avena*, criminal defendants who receive relief from procedural bar rules on review and reconsideration will have to demonstrate that "the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." *Avena*, ¶ 121. This Court has also suggested that to obtain relief from the failure to supply consular notification a criminal defendant would have to show that the "[Article 36] violation had an effect on the trial." *Breard*, 523 U.S. at 377 (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991)). Indeed, this Court based its refusal to provide relief to Mr. Breard, in part, on the grounds that "no . . . showing [of prejudice] could even arguably be made." *Id.*

Not all foreign detainees will be able to demonstrate at the state habeas phase that an Article 36 violation prejudiced their trial. In these cases, the burden placed on state courts will be minimal because it will not be necessary to order a new trial or a new sentencing hearing. The sole restriction the Vienna Convention places on state courts is that they may not "interpose procedural default to prevent review and reconsideration." Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 48. Accordingly, any concerns that a limited restriction on the use of procedural bar rules in state collateral proceedings would pose anything beyond a minimal obligation are misplaced.

Nevertheless, there are criminal defendants, like Mr. Bustillo, who can demonstrate that the failure of law enforcement authorities to provide the notification required by the Vienna Convention made a material difference to the outcome of their trial. As this Court has long held, the ability of the treaty power to alter the operation of state law in state courts goes beyond the ability of federal legislation to do so. *See Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("It is obvious that there may be matters of the sharpest exigency

for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could. . . ."). Accordingly, in cases where criminal defendants have a right under the ICJ's binding interpretation of Article 36 to review and reconsideration of their sentences, the ABA respectfully submits that states may not use procedural bars to evade our federal obligation to provide relief.

CONCLUSION

For the reasons set forth above the ABA respectfully submits that the Court should reverse the judgment of the Supreme Court of Virginia.

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Supreme Court, U.S.
FILED
DEC 22 2005
OFFICE OF THE CLERK

1 9

Nos. 04-10566 and 05-51

In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS, PETITIONER,
v.
STATE OF OREGON

MARIO A. BUSTILLO, PETITIONER,
v.
GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS

On Writs of Certiorari to the Supreme Courts of Oregon and Virginia

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law. ABCNY educates the bar and the public about various legal issues, including international law and criminal procedure. ABCNY is concerned that the United States has not been honoring its obligations under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention"), to inform foreign nationals arrested in the United States of their rights to consular notification and access. This failure prevents foreign nationals from enjoying the full protections that our legal system provides to guarantee fair criminal trials. It also discourages other nations from respecting the consular notification rights of U.S. nationals arrested abroad – rights that may be critical to their fair treatment by foreign criminal justice systems. ABCNY believes that this Court must hold that the Vienna Convention confers enforceable rights – both because the Convention's text confers those rights in unmistakable terms, and in order to ensure that foreign nationals in the United States and U.S. nationals abroad receive the consular notification and access guaranteed by the Convention and critical to fair criminal procedures.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases are about ensuring a fair criminal process both for foreign nationals arrested in the United States and for U.S. nationals arrested abroad. Almost 40 years ago, the United States ratified the Vienna Convention, a multilateral treaty to which 168 nations are now parties. The Convention recognizes

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[1] Letters from petitioners and respondents indicating consent to file this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.